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No. 52957-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Cullen Thomas,

Appellant.

Clark County Superior Court Cause No. 17-1-00087-6

The Honorable Judge John Fairgrieve

Appellant's Reply Brief

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ARGUMENT

I. THE COURT SHOULD HAVE ALLOWED MR. THOMAS TO INTRODUCE *RES GESTAE* EVIDENCE TO “COMPLETE THE STORY” OF THE BAIL JUMP CHARGE.

- A. The court violated Mr. Thomas’s right to testify and his right to present relevant admissible evidence.

An accused person may “gain credibility with the jury” by conceding guilt on one charge; doing so “can be a sound trial tactic.” *State v. Hermann*, 138 Wn.App. 596, 605, 158 P.3d 96 (2007); *see also State v. Silva*, 106 Wn.App. 586, 595-599, 24 P.3d 477 (2001). This was the strategy the defense sought to pursue at trial.

Mr. Thomas was charged with two counts of forgery, but he was also charged with bail jumping. CP 3. He hoped to “gain credibility with the jury”¹ by admitting guilt and explaining why he missed court. This would have been “a sound trial tactic” even though his testimony would not raise a defense to the bail jumping charge. *Hermann*, 138 Wn.App. at 605.

A bare admission of guilt would have been counterproductive. Only by providing context could Mr. Thomas avoid the implication that he was “a bad guy,” “a scofflaw,” and “a bad man” who deliberately skipped

¹ *Hermann*, 138 Wn.App. at 605.

his court date. RP 44, 64; CP 16. He hoped to “fill in the gaps” for the jury, so jurors wouldn’t draw “a very negative inference.” RP 44; CP 16.

The evidence was admissible as “res gestae” evidence. *See* Appellant’s Opening Brief, pp. 11-13. The proffered evidence “complete[d] the story” of the bail jumping charge. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (internal quotation marks and citations omitted).

The evidence was admissible because it “established background information,”² providing “immediate context of happenings near in time and place” to the missed court date. *Lane*, 125 Wn.2d at 831. It was “a piece in the mosaic” making up the crime. *State v. Powell*, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) (internal quotation marks and citation omitted).

Respondent argues at length that the evidence was not relevant to any defense. Brief of Respondent, pp. 8-11. But Mr. Thomas does not claim that the evidence was relevant to any defense. *See* Appellant’s Opening Brief, pp. 11-13. Respondent’s argument on this point is directed at a non-issue.

² *State v. Brown*, 132 Wn.2d 529, 579, 940 P.2d 546 (1997), *as amended* (Aug. 13, 1997).

Likewise irrelevant is Respondent's argument that the evidence was not admissible as character evidence. Brief of Respondent, pp. 10-12. Mr. Thomas does not suggest that the evidence should have been admitted as character evidence. *See* Appellant's Opening Brief, pp. 7-13.

According to Respondent, the evidence was inadmissible as *res gestae* evidence because "the crime was over and finished on the day Thomas missed his court date." Brief of Respondent, p. 12. Apparently, Respondent believes that *res gestae* evidence cannot encompass conduct occurring after completion of the crime.

Respondent cites no authority supporting this argument. Brief of Respondent, p. 12. The Court of Appeals should assume counsel has found no supporting authority after diligent search. *Clark Cty. v. Growth Mgmt. Hearings Bd.*, --- Wn.App.2d ---, ___, 448 P.3d 81 (2019).

Furthermore, Respondent's argument reflects a misunderstanding of the law. *Res gestae* evidence need only be "near in time" to the charged crime.³ *Lane*, 125 Wn.2d at 831 (internal quotation marks and citation omitted). This can include conduct within a few days of the charged crime. *See Brown*, 132 Wn.2d at 575-576. It can even encompass evidence of events more than a year after criminal conduct ceased, when necessary to

³ In Appellant's Opening Brief, appellate counsel erroneously attributed this quotation to the Supreme Court's opinion in *Brown*. *See* Appellant's Opening Brief, p. 12.

complete the story of the crime. *See State v. Warren*, 134 Wn.App. 44, 62, 138 P.3d 1081 (2006), *aff'd*, 165 Wn.2d 17, 195 P.3d 940 (2008).

In support of its argument, Respondent mischaracterizes the only authority it cites regarding the *res gestae* issue. Brief of Respondent, p. 12 (quoting *Brown*, 132 Wn.2d at 571). Quoting language out of context, Respondent argues that *res gestae* evidence “must be evidence that is ‘relevant to a material issue and its probative value must outweigh its prejudicial effect.’” Brief of Respondent, p. 12 (quoting *Brown*, 132 Wn.2d at 571).

The quoted language refers to ER 404(b). After determining that evidence of an uncharged crime is admissible under the *res gestae* rule, courts must still determine if the evidence should be excluded under ER 404(b). *Brown*, 132 Wn.2d 571. *Brown* does not create additional requirements for *res gestae* evidence generally; the quoted language applies only to *res gestae* evidence of uncharged crimes subject to ER 404(b).

Here, the proffered testimony was admissible as *res gestae* evidence, to “complete the story” of the bail jumping charge. *Lane*, 125 Wn.2d at 831 (internal quotation marks and citation omitted). It was part of “a sound trial tactic,” given the strong evidence that Mr. Thomas was guilty of bail jumping. *Hermann*, 138 Wn.App. at 605. It would have

allowed him to “gain credibility with the jury,” and thus helped support his testimony regarding the forgery charges. *Id.*

By excluding the evidence, the trial court violated Mr. Thomas’s “fundamental” right to testify under the state constitution. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999); Wash. Const. art. I, §22. It also infringed his state constitutional right to present a defense.⁴ Wash. Const. art. I, §§3 and 22; *State v. Martin*, 171 Wn.2d 521, 528, 252 P.3d 872 (2011); *Jones*, 168 Wn.2d at 720-725.

The constitutional error is not harmless beyond a reasonable doubt. *See State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014).

Respondent makes no attempt to argue that the error was harmless beyond a reasonable doubt. Brief of Respondent, pp. 13-14. This failure may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099 (1997).

Contrary to Respondent’s argument, the error requires reversal of all three charges. First, Mr. Thomas’s defense to the forgery charges rested on his credibility, which the prosecutor attacked in cross-examination and

⁴ Similarly, the court’s ruling excluding Mr. Thomas’s evidence violated his federal constitutional right to testify and to present a defense. *State v. Jones*, 168 Wn.2d 713, 720-725, 230 P.3d 576, 580 (2010); *Rock v. Arkansas*, 483 U.S. 44, 49-53, 107 S. Ct. 2704, 2708, 97 L. Ed. 2d 37 (1987); *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *see also* Appellant’s Opening Brief, pp. 13-16.

during closing. RP 268-280, 339-345. By admitting the bail jumping and completing the story of the crime, Mr. Thomas would have demonstrated his credibility to the jury. RP 40-69, 263-267, 311, 314; CP 15-17.

Had he been permitted to “gain credibility with the jury”⁵ in this manner, one or more jurors might well have accepted his testimony and voted to acquit on the forgery charges. Because of this, the exclusion of the evidence requires reversal of the forgery convictions.

Second, Mr. Thomas should have the opportunity to pursue the same strategy on retrial of the forgery charges. This requires reversal of the bail jumping conviction. Absent reversal, the error would leave him facing trial on the forgery charges without the ability to demonstrate his credibility by admitting guilt on the bail jumping charge.

Respondent erroneously argues that the error would affect only the bail jumping conviction. Brief of Respondent, pp. 13-14. In making this argument, Respondent again describes the evidence as “improper character evidence regarding Thomas’s credibility.” Brief of Respondent, p. 13.

This reflects a misunderstanding of the facts and the law. Mr. Thomas did not seek to testify to his own good character; nor did he wish

⁵ *Hermann*, 138 Wn.App. at 605.

to provide facts proving his honesty. Indeed, the facts he sought to introduce showed that he was guilty of a crime. RP 40-69, 263-267, 311, 314; CP 15-17.

The admission of such evidence “can be a sound trial tactic” precisely *because* it “may help the defendant gain credibility with the jury.” *Hermann*, 138 Wn.App. at 605. Appellate courts agree that conceding guilt is “designed to gain credibility with the jury.” *Silva*, 106 Wn.App. at 595-599. This does not transform the evidence into character evidence.

Res gestae evidence will often bear directly on credibility. Thus, for example, in *Warren*, the State was permitted to introduce *res gestae* evidence because it enhanced the alleged victim’s credibility. *Warren*, 134 Wn.App. 63. The evidence was necessary to rehabilitate the witness because the defendant attacked the witness’s credibility. *Id.*

Similarly, in this case the State attacked Mr. Thomas’s credibility. RP 268-280, 339-345. Mr. Thomas wished to counter that attack by admitting the bail jumping and providing context to “complete the story” of that offense. *Lane*, 125 Wn.2d at 831 (internal quotation marks and citations omitted). He should have been permitted to do so.

The trial court violated Mr. Thomas’ right to testify and his right to present a defense. *Robinson*, 138 Wn.2d at 758; *Jones*, 168 Wn.2d at 720-

725; *Rock*, 483 U.S. at 49-53; *Holmes*, 547 U.S. at 324. His convictions must be reversed, and the case remanded for a new trial.

B. Mr. Thomas’s constitutional claims must be reviewed *de novo*.

When a discretionary decision violates a constitutional right, review is *de novo*. *Jones*, 168 Wn.2d at 719; *see also State v. Buckman*, 190 Wn.2d 51, 57-58, 409 P.3d 193 (2018); *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). Respondent suggests that an abuse-of-discretion standard applies but does not engage with Mr. Thomas’s argument regarding the standard of review. Brief of Respondent, pp. 7-8.

The question will be resolved by the Supreme Court when it issues its decision in *State v. Arndt*, 193 Wn.2d 1001, 438 P.3d 131 (2019) (granting review).⁶ Accordingly, Mr. Thomas does not provide additional argument regarding the standard of review.

II. RESPONDENT CONCEDES THAT REMAND IS NECESSARY TO DETERMINE THE NATURE AND EXTENT OF EX PARTE CONTACT BETWEEN THE COURT AND DELIBERATING JURORS.

Respondent concedes that the case “should be remanded for an evidentiary hearing to determine whether any contact between the court and the jury occurred while the jury was deliberating.” Brief of Respondent, p. 14. Based on this concession, the Court of Appeals should

⁶ The Supreme Court heard oral argument in *Arndt* on June 27, 2019.

remand for a hearing to determine the nature and extent of any ex parte communication.

CONCLUSION

The trial court should have allowed Cullen Thomas to testify on his own behalf and to introduce relevant, admissible evidence. The excluded evidence completed the story of the bail jumping charge. It would have allowed him to demonstrate his credibility to the jury by conceding guilt and explaining the surrounding circumstances. The convictions must be reversed, and the case remanded for a new trial.

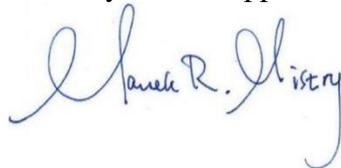
In addition, the State concedes that the case must be remanded for an evidentiary hearing to determine the nature and extent of any improper ex parte contact with the deliberating jury.

Respectfully submitted on October 14, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 14, 2019.



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